CLERK

Petition not granted

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 21, 1942
CERTIORARI GRANTED JUNE 8, 1942

SUPREME COURT OF THE UNITED STATES

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1 In United States Circuit Court of Appeals,
Eighth Circuit

No. 11958—November Term, A. D. 1941

JESSIE WILLIAM MILLER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Arkansas

Mr. Phil G. Alston filed brief for Appellant.

Mr. Thomas C. Pitts, Assistant United States Attorney (Mr. Clinton R. Barry, United States Attorney, and Mr. John E. Harris, Assistant United States Attorney, were with him on the brief) for Appellee.

Before SANBORN and JOHNSEN, Circuit Judges, and NORDBYE, District Judge

Opinion

November 25, 1941

NORDBYE, District Judge, delivered the opinion of the court.

The appellant, Jessie William Miller, was convicted of the crime of kidnapping under the so-called Lindbergh Law, 18 U. S. C. A. 408a, Act of June 22, 1932, as amended by Act of May 18, 1934, Chap. 301 48 Stat. 781. The indictment charges that the appellant and his wife Artilla Miller, on
2 or about August 28, 1939, lured, decoyed, kidnapped and inveigled one Dorothy Garner from a point in Arkansas to a point in the State of Texas for the purpose of holding her in involuntary servitude and to make her work in their behalf, and that they held her in such captivity and servitude by force, threats, and beatings until February 28, 1940. The indictment further charges that the luring and inveigling consisted of certain false statements made by the defendants to Dorothy Garner to the effect that her grandfather was ill in Texas and desired her to come to him. It was alleged that, at the time of the kidnaping, Dorothy Garner was over eighteen years of age and a married woman.

Dorothy Garner is the illegitimate daughter of Artilla Miller, wife of the appellant. The marriage of the appellant and Artilla Miller took place subsequent to the birth of Dorothy Garner, whose putative father was a man by the name of Monroe. She

was approximately eighteen months old when her mother married the appellant and she lived in their household for about four months. Thereafter, she lived with her grandfather until, with the consent of the mother, she was married on September 6, 1936, to one Will Garner. At the time of her marriage she was approximately fifteen years of age. The testimony was in conflict as to whether or not she had attained her eighteenth birthday when the offense herein took place. However, at the close of all the testimony, the court directed a verdict of not guilty as to the mother, Artilla Miller, but refused to instruct the jury, as appellant requested, that if they found that Mrs. Garner was not eighteen years of age at the time of the offense, they should acquit him. It was appellant's contention that, as the husband of the mother of the illegitimate daughter who was kid-
3 naped, he was a parent within the meaning of the statute, and consequently, if she was a minor, he was entitled to an acquittal.

This appeal does not raise any other question but the correctness of the court's ruling in refusing to submit to the jury the age of Mrs. Garner at the time she was kidnaped. It was the trial court's opinion that this question was immaterial because the appellant was not a parent within the purview of the statute. It is recognized that Mrs. Garner was domiciled in Arkansas at the time of the offense, and under the laws of that State a girl under eighteen years of age, although married and thereby emancipated, is considered a minor. Pope's Digest of the Statutes of Arkansas, Section 6215, states:

"Males of the age of 21 and females of the age of 18 years shall be considered of full age for all purposes and until those ages are attained, they shall be considered minors."

See, Watson v. Billings, 1881, 38 Ark. 278, 42 Am. Rep. 1; Harrod v. Myers, et al. 1860, 21 Ark. 592, 76 Am. Dec. 409.

The pertinent portion of the Act in question provides:

"Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted or carried away by any means whatsoever and held for ransom or reward or otherwise except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished * * *."

This statute as first enacted (June 22, 1932) was limited to cases of kidnaping for reward or ransom. Later, on May 18, 1934, the Act was amended so as to extend jurisdiction to
4 cases where a person was kidnaped by any means and held for ransom or reward *or otherwise, except, in the case of a minor by a parent thereof.* [The italicized portion indicates

the amendment.] Manifestly, the exception noted was prompted by the extension of federal jurisdiction to all kidnaping involving interstate commerce, regardless of the purpose for which the kidnaped person was held. Gooch v. United States, 297 U. S. 124. The records of the domestic relations courts throughout the Nation are replete with instances where, when domestic difficulty arises, parents, because of affection for their children, inveigle or spirit them away. In absence of the exception, such person might suffer the condemnation of the statute if interstate commerce were involved. It may be that Congress was primarily concerned with this class of cases when the exception was framed. This view is in accord with the dictum in the Gooch Case, wherein Justice McReynolds, in discussing the 1934 amendment, but with reference to its application to the kidnaping of police officers who were held by gunmen for the purpose of avoiding apprehension or preventing an alarm being given, stated (p. 128 of 297 U. S.):

"* * * If the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise.'

"The words 'except, in case of a minor, by a parent thereof' emphasize the intended result of the enactment. They indicate legislative understanding that in their absence a parent, who carried his child away because of affection, might subject himself to condemnation of the statute. Brown v. Maryland, 12 Wheat. 419, 436."

The appellant contends, however, that he is entitled to the most liberal and favorable interpretation of the statute consistent with legislative intent, and that, if he is afforded such construction, he should be characterized as a parent within the meaning of the Act. At the outset, it should be noted that, by strict construction, the appellant was not the stepfather of Mrs. Garner. The term "stepfather" generally means the husband of one's mother by a subsequent marriage. 60 Corpus Juris, p. 32. Or, as stated in 46 Corpus, p. 1337:

"The relation of step-parent and stepchild is that existing between a husband or wife and the child of his wife or her husband as the case may be by a former marriage."

See, Thornburg v. American Strawboard Co., 141 Ind. 443, 445, 45 N. E. 1062, wherein it was stated:

"As generally understood, the husband of one's mother by a subsequent marriage is a stepfather; strictly speaking, therefore, a man who marries the mother of an illegitimate child does not become the stepfather of such child."

The definition of the term "step-parent", however, is not particularly important nor is it controlling herein. Even though it may be assumed that, if Mrs. Garner had been a member of appellant's household, cared for and nurtured by him and in his custody and control, the relationship of stepfather and stepchild would have existed in the generally accepted usage of such terms, the evidence herein does not present such a picture. At the time of the kidnaping, Mrs. Garner was living with her husband at DeQueen, Arkansas, and had been married for about three years. She had assumed a new duty as a wife with a responsibility to her husband and to her own home. She was no longer subject to the control or supervision of her mother. She was an emancipated married woman. From the time she was twenty-two months of age until her marriage, she had made her home with her grandfather, except for a short period when she
6 was in an orphanage. She was neither a member of appellant's household nor of his wife's household. It is conceded that he had never assumed any parental relationship to her. He had never supported her and had never presumed to exercise any custody or control over her.

The term "parent" primarily means one who begets a child. It usually denotes consanguinity rather than affinity. However, it is also well recognized that the term "parent" in a broad sense and under certain circumstances may include anyone who stands in a position equivalent to that of a parent. However, the appellant had never accepted any of the duties and liabilities, or exercised any of the rights of one who stood in loco parentis. In so far as any actual parental relationship was concerned, he was at the time of the offense, at least, substantially the same as an utter stranger to this minor. A step-parent, by reason of this relationship alone, has no right to the custody or control of the stepchild. Englehardt v. Yung's Heirs, 1884, 76 Ala. 534; Ex parte Flynn, 1917, 87 N. J. Eq. 413, 100 Atl. 861. Nor has he any duty to support the stepchild. State v. Barger, 14 Ohio App. 127; Kempson v. Goss, 1901, 69 Ark. 451, 64 S. W. 224; Copek v. Kropik, 1889, 129 Ill. 509, 21 N. E. 836; In re Besondy, 32 Minn. 385. A stepfather does not merely by reason of such relationship stand in loco parentis to the stepchild. Popejoy v. Hydraulic Pressed Brick Co., 193 Mo. App. 612, 186 S. W. 1133. The assumption of the relationship is a question of intention. Howard v. United States, 2 F. 2d. 170; Meisner v. United States, 295 F. 866, 868; Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133. Neither intention nor fulfillment is found herein. A fair consideration of the entire record impels the conclusion that
7 the evidence is barren of any fact or circumstance which would even remotely tend to establish the relation of par-

ent and child at the time of the offense as between the appellant and the person he kidnaped. We do not desire nor attempt to lay down any rule which will apply to all situations where the question may arise as to the construction to be given to the exception in this statute. Presumably, each case must be decided on its own merits. Any construction should, however, not only harmonize with the context of the Act, but the end in view. A construction which would lead to absurd results is to be avoided. It is our view that, even under the broadest and most latitudinarian definition or understanding of the term "parent," the appellant's relationship to this minor at the time of the offense cannot be so characterized.

Furthermore, the exception of this statute must be strictly construed. The burden was on the defendant to bring himself within the exception. Detroit Edison Co. v. Securities & Exchange Commission, 119 F. 2d 730; Schlemmer v. Buffalo, Rochester & P. R. Co., 205 U. S. 1; McKelvey v. United States, 260 U. S. 353. This he conspicuously failed to do. The trial court was right in holding that the evidence impels a finding that the appellant was not a parent of Mrs. Garner as that term is used in the exception of the Act, and therefore the requested instruction was rightfully refused. No other question having been raised on this appeal, it follows that the judgment must be and is affirmed.

8 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Petition for rehearing and writ of certiorari

Filed Jan. 5, 1942

To the Honorable, Senior, Presiding Judge, for the United States Circuit Court of Appeals, Eighth Circuit:

Comes now the petitioner, Jessie W. Miller, and respectfully requests this Honorable Court to issue a Writ of Certiorari to the District Court of the Western District of Arkansas, to have prepared at Government expense, a full and complete record of all the testimony given in the case, and to forward same and said record to this Honorable Court for review and reconsideration.

APPELLANT'S STATEMENT

I, Jessie W. Miller, with my wife and three children, were employed at cotton picking at McKenney, Texas, at such time as

we were in receipt of a letter from one, Dorothy Garner, plaintiff, asking that we "come after her"; we, complying with her request drove into the State of Arkansas as she had requested in her letter. She requested that we tell "her man," Will Garner, that the plaintiff's grandfather was ill in order to leave the impression with Will Garner that she was not leaving him; this was done by her mother. After living with myself and family for some six months, plaintiff became offended because she was unable to do as she wished in the presence of our children. She had further "inflicted punishment" upon her 18-months-old child, until such time as her mother took charge of the infant and cared for it; further she became incensed and offended because she could not do the things referred to herein and so left us, hitch-hiking on a 200 mile trip, being hurt on the way, and when she arrived at the home of her "man," told him her story in order to "make up" with him.

9 When the Honorable Harry J. Lemley, Judge, imposed sentence upon me, he admitted as follows:

"There is doubt in my mind of you having criminal intent when you went after the girl."

The Judge then imposed a 7-year sentence upon me, later entering a Court order reducing the sentence to 5 years, stating as follows:

"I have never heard or tried a case like this one in my life." Congress never intended that a man be punished for a kindly deed. Further, with due respect to my attorney, appointed by the court; the question of Plaintiff's age was raised in the appeal which was bitterly opposed, regardless of my desire to have such question raised and my attorney ignorant of the law in this respect. The evidence did not support the verdict, and I, without friends, could not do otherwise than accept the verdict. Thanking you for your kind attention, I remain

Very sincerely,

JESSIE W. MILLER,
Jessie W. Miller,
Appellant.

10 *Statement of the Case*

Record will show:

Jessie W. Miller, defendant, was picking cotton for Mr. Hartline at McKinney, Texas, at the time of receipt of a written request from Dorothy Garner, plaintiff. Defendant left Mr. Hartline's home and went to Arkansas after plaintiff and returned the next day and continued to pick cotton for a period of 10 days. During said period plaintiff was at her liberty and

all worked together. Defendant and wife went to town and left plaintiff alone at Mr. Hartline's home where it was possible for her to use the telephone should she desire to do so, or to have left had she so desired; however, plaintiff failed to do so, and further, at no time did she mention that anything was wrong. This was the first stop made with plaintiff and she was treated as one of the family by the defendant and said family, everything being normal and all was as it should be in relationships between the members of the group.

Testimony of Mr. Fred Cotton, Snyder, Texas:

"Defendant and family stayed at my place two weeks, and picked cotton, and were in my yard and house, before day, and after night, and plaintiff went anywhere she wished and got wood and water at my back door, and the defendant and wife went to town and left the plaintiff at my house, and everything was OK."

Testimony of four other witnesses.

"While defendant was incarcerated at Snyder, Texas, over plaintiff's misbehavior, the plaintiff was examined by a medical doctor, and questioned by law enforcement officers and was in the Court House with the court officials alone, and the doctor said plaintiff was weak-minded and that they couldn't find anything otherwise wrong."

Record will show:

"Plaintiff stayed in a tourist camp at Snyder, Texas, while defendant and family worked, and plaintiff talked to people; had free access to the telephone, or could at any time have told anyone she was "fooled" away from her home, but plaintiff failed to do so."

11

Record will show:

"Plaintiff wrote two letters to Will Garner, plaintiff's husband, and one at Fort Worth, Texas, on the road to Snyder, Texas, and stated she had another 'man' and one at Sherman, Texas, and asked him to come after her baby."

Record will show:

"Plaintiff was very cruel to her baby."

At Sherman, Texas, where the defendant lived when arrested, the record will show:

Testimony of the 15th District Judge, Mr. H. J. Arterberry, F. B. I., Dallas, Texas, and other responsible persons:

"That they talked to plaintiff and saw her all over town at different times, going wherever she wished. Some witnesses, Mr. McClure and Mr. Frank Fielder, ran a business within one hundred and twenty-five feet of the tourist cabins where defendant lived and that everything was OK."

Record will show:

Mrs. Raymond Russell's testimony:

"She talked to the plaintiff at a point 15 blocks from home and asked plaintiff why she had left her husband and plaintiff replied, 'He wasn't what I thought he was.'"

Testimony of Mr. H. T. Arterberry, F. B. I.:

"I went to defendant's home and made an investigation, a month prior to his arrest, and when I arrived at defendant's home, the plaintiff was out looking for work, and I left and later returned and talked to her. After identifying myself to plaintiff, she declared that Will Garner, plaintiff's husband was behind it all, and I couldn't find anything wrong, and after investigating through the sheriff and police force, everything was alright."

12 The record will show:

"Plaintiff was wilfully delinquent with men over her age, and was feeble-minded at age of 10 years." Testimony of Dr. J. N. Norman, Trenton, Texas.

The record will show:

"That plaintiff left defendant's home because her mother (defendant's wife), inflicted punishment upon plaintiff for displaying "sexual misconduct" in the presence of defendant's three children."

The record will show:

"The plaintiff never complained of being fooled, lured, or kidnaped away from her home, and that she did at all times have her freedom."

The record will show:

"That the plaintiff, when she left defendant's home, had not been beaten, nor was she bruised as the prosecution attempted to show."

Therefore, the defendant, Jessie W. Miller, now appellant, does not desire to cause the court any grievance; however, appellant sincerely prays that said court will demand the full transcript of record since Jessie W. Miller, appellant, is not guilty of the crime accused and for which he was sentenced and committed.

Respectfully submitted.

JESSIE W. MILLER,
Petitioner.

Sworn and subscribed to before me this 2nd day of January 1942.

[SEAL] GEORGE D. EBERSTEIN,
Notary Public.

My commission expires May 8, 1944.

[File endorsement omitted.]

13 In United States Circuit Court of Appeals, Eighth Circuit

No. 11958—November Term, A. D. 1941

JESSIE WILLIAM MILLER, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Arkansas

Before SANBORN and JOHNSEN, Circuit Judges, and NORDBYE, District Judge

Opinion

Jan. 19, 1942

(On applications for appointment of counsel for appellant and for order directing that complete transcript of all testimony be sent to this Court, etc.)

PER CURIAM: Since this Court decided this case (November 25, 1941), 123 F. 2d 715, the appellant has filed applications praying (1) for the appointment of counsel to conduct further proceedings in his behalf, and (2) for an order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at his trial be sent to this Court to enable it to review and reconsider his case. Attached to these application is a "Statement of the Case," which, if true, indicates that the appellant was wrongfully convicted of the crime of kidnapping.

The record on appeal was only sufficient to present the one question which was submitted to this Court for decision, namely, whether the trial court should have submitted to the jury the question of the age of the person who was allegedly kidnapped by the appellant, it being his contention that such person was a minor and that he was her parent because she was the illegitimate child of his wife, and that therefore he came within the exception in the applicable statute which excluded the kidnapping of a minor child by a parent. We have decided the only question presented to us adversely to the appellant and have affirmed
14 his conviction. We have no intention of reconsidering the question decided. Ordinarily under such circumstances the case should be ended so far as this Court is concerned.

However, in Holmes v. United States, — U. S. —, 62 S. Ct. 357, the Supreme Court, "on the Government's consent," vacated a

judgment of this Court affirming a conviction (see 115 F. 2d 528), and ordered this Court to conduct further proceedings. We had affirmed the judgment in the Holmes case because there was no bill of exceptions (the testimony at the trial had not been reported) and because we were led to believe from the representations made by the United States Attorney for the District of Nebraska and by counsel appointed by us to represent the appellant in that case that there was no possibility that a bill of exceptions sufficient to enable us to decide the questions which the appellant sought to present could ever be procured. In view of the Government's action in the Holmes case, it seems advisable in this case to give the Attorney General of the United States, as well as the United States Attorney who tried the case, the opportunity to inform us as to the Government's position in the matter, so that, if the Government desires to consent to the reopening of the case, it may do so here, without subjecting the appellant to the unnecessary burden in such a situation of having to petition for certiorari, before the consent is granted.

It is therefore ordered that the Clerk of this Court forward by mail both to the Attorney General of the United States and to the United States Attorney for the Western District of Arkansas copies of this order and of the appellant's applications, and that they make their respective responses to the applications within thirty days from the date of the filing hereof.

It is further ordered that a copy of this order be mailed by the Clerk to the appellant, that the Government mail copies of its responses to the appellant, and that he have ten days after he has received copies of the responses to file his reply thereto with the Clerk of this Court.

January 19, 1942

15 In United States Circuit Court of Appeals,
Eighth Circuit

[Title omitted.]

Response of appellee to order of January 19, 1942

Filed Feb. 18, 1942

Comes now Clinton R. Barry, United States Attorney for the Western District of Arkansas, who makes the following response to the order of this Court filed January 19, 1942, for and on behalf of the Attorney General of the United States and as Attorney for Appellee herein.

In response to the order of this Court filed January 19, 1942, directing that response be made to said order, he respectfully states:

That Appellant was indicted in the U. S. District Court for the Western District of Arkansas, on May 22, 1940, said indictment, in one count, charging the said Appellant Jesse William Miller, with a violation of Section 408A, Title 18, U. S. C. A. Said indictment is as follows, to wit:

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

In the District Court of the United States, in and for the Western District of Arkansas, at the January adjourned Term thereof, A. D. 1940,

The Grand Jurors of the United States impaneled, sworn, and charged at the Term aforesaid, of the Court aforesaid, on their oath present, that Jesse William Miller, and Artilla Miller, on the 28th day of August, 1939, in the said Texarkana Division of said District and within the jurisdiction of said Court, and in the town of De Queen, and State of Arkansas, did unlawfully, willfully, and feloniously inveigle, decoy, kidnap, and abduct one Dorthie Crawford Garner, a married woman, then and there residing at or near De Queen, Sevier County, Arkansas, by falsely and fraudulently representing to the said Dorthie Crawford Garner that her grandfather, J. H. Crawford, then residing at Trenton in the State of Texas, was seriously and violently ill and that he wanted to see the said Dorthie Crawford Garner, and by such false and fraudulent representations, the defendants thereby persuaded her, the said Dorthie Crawford Garner, to accompany them from De Queen, Sevier County, Arkansas, to a point near the town of McKinney, in the State of Texas, for the sole and deliberate purpose of forcing the said Dorthie Crawford Garner to work and labor for the said defendants near McKinney, Texas, and other places to the Grand Jurors unknown, and forced her, the said Dorthie Crawford Garner, to so work by means of threats, intimidations, and violent beatings inflicted by the defendants upon the person of the said Dorthie Crawford Garner, and that they so held the said Dorthie Crawford Garner against her will under said threats, intimidations, and violence inflicted upon her person in servitude from August 28, 1939, to February 29, 1940, when the said Dorthie Crawford Garner escaped from the custody of said defendants, the said Dorthie Crawford Garner on all dates mentioned herein being over the age of eighteen years, contrary to

the form of the statute in such case made and provided, and against the peace and dignity of the United States.

CLINTON R. BARRY,
United States Attorney.
By HARDY K. MACLAY,
Acting Assistant U. S. Attorney.

The trial of this case commenced in the Texarkana Division of the U. S. District Court for the Western District of Arkansas on January 27, 1941, and lasted until February 3, 1941, at which time said case came to a conclusion by a jury verdict of guilty as to the appellant Jesse William Miller.

17 The case of Holmes v. United States — U. S. —, 62 S. Ct. 357, is very different from the instant case and the distinction is clear, in, that in the instant case all of the case was reported by the Official Court Reporter, whereas in the Holmes case, supra, Holmes was indicted with two co-defendants and all of the defendants employed a regular court reporter. Holmes' two codefendants changed their plea from not guilty to nono contendere and prior to the introduction *os* testimony the reporter left. Present at the trial in the Holmes case as a Government witness was a Miss Mary Rose Murtaugh, who was closely associated with the defendants and their activities, having been a member of the Board of Directors and the Secretary of three of the corporations involved. She was an important witness for the Government; since her testimony outlined the business of the companies in detail, and she also identified many exhibits *p*ffered and received in evidence. While Miss Murtaugh was a stenographer she had had no experience as a court reporter. After she had testified and after a Mr. Holtzman, the bookkeeper of the companies, had completed part of his testimony Holmes' attorney requested that Miss Murtaugh be permitted to occupy the reporter's table and report the evidence. Because of the fact that the Government objected to this, but had no objection to her sitting at the counsel table and making notes for the benefit of Holmes and his attorney, the trial court permitted this to be done. Sometime after the trial counsel for Holmes had Miss Murtaugh to transcribe the testimony from her notes, but the United States Attorney pointed out that the transcript was incomplete and inaccurate. It omitted some of the testimony of Holtzman and another witness as well as Miss Murtaugh's own testimony, which was important, and the testimony transcribed was in many instances inaccurately reported. The Government in the Holmes case consented to vacate the judgment of this Court affirming the conviction, and the Supreme Court ordered this Court to vacate its order affirming the judgment of conviction and to enter an order affording reasonable time for the

preparation, presentation, settling, and filing a suitable bill of exceptions. The consent of the Government was based upon the fact that after the Holmes case, supra, came up to the Supreme Court the attorneys for the Government ascertained from the U. S. Attorney representing the appellee in this Court that by earnest cooperation between him and counsel for Holmes it was likely that a satisfactory bill of exceptions could be prepared. The Government consented to remand of the Holmes case in order that this could be done. The clear distinction being that in the instant case the entire proceeding and testimony was reported by the official court reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas, and a complete bill of exceptions and transcript of the record was available to the appellant, whereas in the Holmes case, supra, only parts of the testimony was reported and that not by an official court reporter.

With reference to that part of the appellant's petition requesting an order directing that at the Government's expense a full and complete transcript of all the testimony taken at his trial be sent to this Court to enable it to review and consider his case, it is to be noted that under a ruling of the Comptroller General (9 Comp. Gen. 503) the Government is without authority to pay for the cost of a transcript of testimony for the use of an indigent defendant appealing in forma pauperis under Section 832, Title 28, U. S. C. A.

As heretofore stated, the trial of this case lasted seven days and many witnesses were introduced in behalf of the Government and the defendant. The Government proceeded to introduce witnesses to support the allegations and charges contained in the indictment heretofore set out. It was the defense of the appellant Jesse William Miller in the trial court that he did not kidnap the said Dorthie Crawford Garner, but that he and his wife went to the home of Dorthie Crawford Garner, who had requested in a letter for them to come after her to take her away from her husband, and that he did not hold her against her will and that she was free to leave at any time and introduced witnesses, including himself, in an attempt to establish his defense. It will be noted that in the bill of exceptions heretofore filed in this Court, the Court in its instructions to the jury (Bill of Exceptions 52 to 60, incl.) submitted to the jury in proper form instructions covering the testimony of the Government and the contentions heretofore stated by the appellant and the jury found the appellant guilty as charged in the indictment. As heretofore stated, the testimony in this case, if transcribed, would be voluminous, but the testimony introduced in behalf of the Government at the trial sub-

stantiated the allegations contained in the indictment, the defendant denying same and defending as above, and the jury finding the appellant guilty as charged in the indictment under proper instructions of the Court. The appellant was represented by able counsel during the trial of this case and a reading of the appellant's brief at page 21 will show that the jury found the defendant guilty as charged in the indictment upon substantial evidence.

The affidavit of Thomas C. Pitts, Assistant United States Attorney for the Western District of Arkansas, who was one of the attorneys who represented the United States in the trial of this case, is attached and made a part of this response. It appears from this affidavit that the official reporter of the Court, Mr. John T. Williams, recorded all of the evidence in the case and now has his notes available to be transcribed. It must be conclusively presumed that the petitioner and his counsel know that this evidence is available. It also appears from Mr. Pitts' affidavit that the Court Reporter for the Texarkana Division of the Western District of Arkansas, is Secretary to Judge Harry J. Lemley. Under these circumstances there is no legal method by which the Court Reporter can be paid by the United States for furnishing this transcript. Under the rulings of the Comptroller General of the United States not only is the Government not liable for a transcript of the evidence to be used in making a bill of exceptions where the appeal is taken in forma pauperis, but the Government is not liable to a Court Reporter who draws a salary as Secretary to a District Judge for a transcription of the evidence in any case, even in those cases where the United States itself is the appellant, such as War Risk Insurance cases, and the Court Reporter cannot be required to furnish a transcript of the evidence to the Government under these circumstances. Inasmuch as the trial of this case occupied the Court for seven days it would be utterly unreasonable to ask the Court Reporter to furnish this transcript and, since Judge Lemley's court faces the prospect of trying from 75 to 100 land condemnation cases in connection with the Hope Ordnance Proving Ground, it is very doubtful that his court reporter could furnish this transcript at any time during the next several months.

This factual situation thus presents this clear legal question: Is a defendant who claims to be ignorant, or actually is ignorant, on that ground alone not within the ordinary and generally accepted rule by which he is bound by the judgment and decision of his lawyer as to matters which by their nature involve the knowledge and application of statutes and rules of procedure, and which are not generally understood even by the most intelli-

gent and best-informed laymen. If this question is to be answered in the affirmative in Federal Courts the situation demands that clear-cut rules of decision be laid down under which trial courts may safely proceed with the feeling that the case is finally disposed of as far as the trial court is concerned when a judgment is entered and mittimus issued. No better case can be found to present this question than the one at bar. The defendant was indicted several months before his trial. He filed an affidavit in forma pauperis several months before his trial and no limitation was placed upon the number of witnesses he was permitted to call from distant points in his behalf, as it was the opinion of the U. S. Attorney that the statute limiting the number to be called at the expense of the United States had no application to a capital case. As the lawyers who defended Miller will probably never see this response we do not hesitate to say that the defense they made was one of the best ever offered in that court. The sufficiency of the Government's evidence was brought before the Court for a direct ruling on a motion for a directed verdict. The Court heard all of the evidence and promptly denied this motion. Instructions were given to the jury by the Court, who had also heard all of the evidence, placing the issue before them as to whether or not the defendant had actually done the things which in law made him guilty of the
21 offense charged in the indictment. The jury promptly said that he had.

The defendant/s counsel was of the opinion that substantial evidence of defendant's guilt had been heard by the jury and that no good purpose could be served by attempting to argue to the Circuit Court of Appeals that the Court should believe Miller's practically unsupported statements as against the well-corroborated evidence of the Government, consequently they decided not to attempt to secure a reversal on that ground. Thus we have the following interesting sequence of events in which the sufficiency of the evidence against petitioner was involved. The case was originally investigated by the Federal Bureau of Investigation. Agents engaged in investigations of this kind are all lawyers and are employed on a salary basis. The agent or agents who investigated the complaint against Miller believed that the facts they uncovered were sufficient to establish Miller's guilt in court. Their report came to the desk of the United States Attorney who carefully read the same and weighed the question of whether a conviction could be secured in the case, it being the opinion of the United States Attorney that a conviction would probably follow an indictment. These facts were submitted to a Grand Jury and after hearing the witnesses under oath, the Grand Jury were of the opinion that the facts pointed

to the defendant's guilt. The Government next presented these facts to a trial jury which also heard all that the defendant could offer in defense, all of which was heard by Judge Lemley, the trial judge. Judge Lemley was of the opinion that the evidence testified to by Government witnesses, if true, justified Miller's conviction and submitted the question to the jury of whether or not this evidence was true. It must be presumed that the defendant's counsel was of the opinion that if the jury believed the Government's evidence the defendant could only escape final conviction by seeking reversal in this Court on the question of law. The conviction having been affirmed, the defendant by his unsupported statement seeks to overturn the whole sequence of events by which his conviction was secure.

If the inference is to be drawn from his statement that no
22 testimony sufficient to establish his guilt was presented to the trial court then the entire personnel of employees and officials of the United States who acted in this case from its inception to the end must be charged either with an utter lack of mental capacity and understanding or with a willful indifference to the rights of an American Citizen, and this charge must include the defendant's own lawyers as well as all of the Government officials involved in the matter.

It is quite possible that the attention of this Court has been arrested by the fact that Judge Lemley, long after he had sentenced Miller, reduced his sentence by two years. The affidavit of Clinton R. Barry, United States Attorney, on this question is attached. As shown by this affidavit Judge Lemley stated that he had calculated the original sentence on the basis that he wanted to feel assured that Miller's children would reach an age when they could shift for themselves and not be likely to be influenced by Miller upon his return from the penitentiary. And that he took into consideration the fact that Miller had served a previous sentence for an infamous crime and was therefore not likely to receive the benefit of a parole. He stated that it had afterward been shown to him that Miller's wife either had obtained a divorce or was about to obtain one and he therefore felt that Miller's future influence over his children need not be further considered, and that for this sole reason he had, on his own motion, reduced the sentence by two years.

Respondent sincerely believes that should the testimony in this case be transcribed, that, after a careful reading of the same by this Court, conviction of the appellant would be upheld by this Court as the jury found the defendant guilty as charged based upon substantial evidence supporting the allegations in the indictment.

In view of what has heretofore been said respondent believes that there is no merit in the appellant's motion for a rehea[illegible]

and complete transcript of all the testimony in this case at Government expense and his petition should be dismissed.

Respectfully submitted.

CLINTON R. BARRY,
United States Attorney,
By THOMAS C. PITTS,
United States Attorney,
Attorneys for Respondent.

23 *Affidavit of Clinton R. Barry*

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

Clinton R. Barry, on oath, says: That he is U. S. Attorney for the Western District of Arkansas, and was at the time mentioned in this affidavit. That on the day that Judge Harry J. Lemley entered an order reducing the sentence of Jesse William Miller from seven years to five years imprisonment, at Texarkana, Arkansas, he was called to Judge Lemley's Chambers and found Judge Lemley there with attorneys representing Miller; and Judge Lemley stated that he had originally sentenced Miller to a seven-year term of imprisonment and that he had decided upon this length of term because he had noted the ages of Miller's children and intended that Miller should remain in prison until his children had reached an age that they could if necessary support themselves and would be too old to be influenced by Miller, and that he had taken into consideration the fact that Miller had served a prison term for an infamous crime and probably would not be paroled; that it had been represented to him by Miller's attorneys that Miller's wife had sued him for a divorce and had either obtained a decree of divorce or would obtain one in the near future, and that under these circumstances he would revise Miller's sentence as he would no longer have to take into consideration the welfare of Miller's children. Further deponent saith not.

CLINTON R. BARRY.

Subscribed and sworn to before me this 16th day of February 1942.

[SEAL] W. PENDERGRASS, JR.
My com. exps. Feb. 1, 1943.

24 *Affidavit of Thomas C. Pitts*

UNITED STATES OF AMERICA,
Western District of Arkansas, Fort Smith Division, ss:

Thomas C. Pitts, on oath, says: That he is Assistant United States Attorney for the Western District of Arkansas, and was at the time mentioned in this affidavit; that he assisted as co-

counsel for the Government in the trial of the case of United States v. Jesse William Miller and Artilla Miller, in the Texarkana Division of the U. S. District Court for the Western District of Arkansas, and being Criminal Case No. 3541, Texarkana Division; that said case commenced on January 27, 1941, and continued to and included February 3, 1941; that John T. Williams, who is the Secretary of Judge Harry J. Lemley of the U. S. District Court, and who is also the Official Court Reporter for the Texarkana Division of the U. S. District Court for the Western District of Arkansas, recorded by shorthand all of the evidence and proceedings in this case and knows that the notes of the trial recorded by the said John T. Williams were available at the conclusion of said trial and he further states that he has personally verified through the said John T. Williams that said notes recorded by John T. Williams are still available at this time. John T. Williams is at this time Secretary to U. S. District Judge Harry J. Lemley and Official Reporter for the Texarkana Division of the Western District of Arkansas. Further deponent saith not.

THOMAS C. PITTS.

Subscribed and sworn to before me this 16th day of February 1942.

[SEAL] W. PENDERGRASS, JR.

My com. exps. Feb. 1, 1943.

[File endorsement omitted.]

25 In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Appellant-petitioner's answer to appellee's response

Filed March 5, 1942

Comes now, Jessie W. Miller, Appellant-Petitioner, in his own proper person, and makes this, his, answer to the Appellee's Response to the Order of this court filed January 19, 1942; said order reading as follows:

"Since this court decided this case (Nov. 25, 1941), 123 Fed. (2d) 715, the Appellant has filed applications praying (1) for the appointment of counsel to conduct further proceedings in his behalf, and (2) for an Order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at his trial be sent to this court to enable it to review and reconsider his case. Attached to these applications is a "State-

ment of the Case," which, if true indicates that the appellant was wrongfully convicted of the crime of kidnapping."

And further:

"In view of the government's action in the "Holmes Case," it seems advisable in this case to give the Attorney General of the United States, as well as the United States Attorney who tried the case, the opportunity to inform us as to the government's position in the matter, so that, if the government desires to consent to the reopening of the case, it may do so here, without subjecting the Appellant to the unnecessary burden in such a situation of having the petition for certiorari, before the consent is granted."

Your petitioner-appellant, Jessie W. Miller, verily believes that the above-quoted order issued by this honorable court was equivalent to "An order to Show Cause" why the writs petitioned for should not be granted, and your petitioner, not being skilled in the Science of Law, seeing no other reason, now proceeds to answer the government's response in that belief.

"One"

Your petitioner made various claims in his applications for rehearing and for a writ of Certiorari that a transcript of the testimony given by all the witnesses at the trial would prove that no such crime of kidnapping, as petitioner was charged with, has ever occurred, and that the conviction was not supported by the evidence, and that the facts as would be found only in the transcript of the testimony would prove that he had been wrongfully convicted of kidnapping.

All of the claims, as to what the "Record Will Show," were completely ignored by the government in its "response." Not one time did the government deny that the transcribed record of testimony would show that which the petitioner swore
26 under oath would be found there, that the evidence did not support the verdict, but conversly would show that no crime of kidnapping was ever committed. This lack of a denial to what the "Record will show" in the government's response is no surprise to your petitioner. The government's attorney knows that every claim made under the heading "Statement of the Case" is positively, affirmatively, and absolutely true. He knew that he could not deny the truth of a written record, so he chose to completely ignore petitioner's claims as to what the transcribed "Record Will Show." The government's attorney, Mr. Clinton R. Barry, chooses to confine his response to this court's order to irrelevant and ext'aneous issues such as (1) The trial court's reason for reducing your petitioner's 7-year sentence to one of 5 years. (2) Pointing out to this learned court his idea of the difference

between the "Holmes Case" and your petitioner's case. (3) Pointing out the limits of this Honorable Court's authority and power to issue orders and writs. (4) Pointing out to this court that if your petitioner proved his innocense by the transcribed record, then all the government's employees would be charged with the utter lack of mental capacity. (5) Pointing out to this court that your petitioner was first investiggted, then indicted, the found guilty, then sentenced all according to form, leaving the inference that even if the transcribed testimony would show lack of evidence to support the guilty verdict, that it would be of no importance because the prescribed legal ritual and rote had been carefully observed. (6) Pointing out to this court that the agents of the Federal Bureau of Investigation "believed that facts they uncovered were sufficient to establish Miller's guilt in court," but failing to point out that no agent recommended that the said facts should be submitted to a Grand Jury, and failing to deny that the transcribed testimony would show that F. B. I. Agent Arteberry investigated the defendant and the plaintiff while the plaintiff was living at defendant's home, and had to report to the U. S. District Attorney's office that he could find nothing wrong.

Your petitioner would now call this court's attention again to this one true fact; the government does not and cannot deny that those claims, which your petitioner swears will be found in the transcribed testimony, which will prove your petitioner was wrongfully convicted of the crime of kidnapping, and under Rule #8 of the federal court procedure, paragraph (D), a lack of a denial is equivalent to an admission of the truth of the allegation. The rule, your petitioner believes to be as follows:

"Effect of failure to deny"

"Averments in a pleading to which a responsive pleading is required * * *, are admitted when not denied in the responsive pleading."

Your petitioner begs this Honorable court to adopt this
27 Rule #8 and apply it to his case, and issue the writ of certiorari to the District Court as an auxiliary writ in aid of its appellate jurisdiction of appeal, or issue an equivalent order to a writ of certiorari directing that the testimony in this capital case be transcribed at government expense and brought before this court to enable it to review and reconsider his case.

"Two"

Your petitioner does not think the full page and one-half of the respouse devoted to clarifying to this court the differences between his case and "The Holmes Case" merits any answer. This court knows the validity of its reasons for its orders. This

court is thoroughly familiar with its decision and its experiences in the Holmes Case.

"Three"

In answer to that part of the government's response which seeks to prove by a Ruling of the Comptroller General (9 Comp. Gen. 503) that the government is without authority to pay for the cost of a transcript of testimony for the use of an indigent defendant appealing in forma pauperis under Section 832 of Title 28 U. S. C. A.

Your petitioner does not believe the rulings of an officer of the Treasury department supercedes the construction of the U. S. Statutes made by the Circuit Courts of this nation. Your petitioner believes the interpretation of the "laws of the land" such as section 832 of Title 28 U. S. C. A. is an exclusive function of the "Courts of the Land" such as this honorable court, the United States Circuit Court for the Eighth Circuit.

Your petitioner has learned that this Honorable Court has held a few times in the past that it would not issue a writ of mandamus compelling the Court Reporter to furnish gratuitously to a pauper a transcript of evidence. "United States ex rel. Estabrook v. Otis, 8 Circuit, 18 Fed. (2D) 689." Your petitioner respectfully submits that his case is *different*, and a decision interpretating Section 832 of Title 28 should rest on the merits of each individual case.

Your petitioner believes it is clear and obvious that in a criminal case, especially a Capital Offense where life and liberty are involved, help to a poor litigant should be forthcoming readily and quickly if he has complied with all the requirements of the statute under which he seeks aid. Your petitioner further claims there is a distinct difference between requesting a transcript of testimony to be used in making a bill of Exceptions where the appeal is taken in forma pauperis, and in requesting the Circuit Court to issue an auxiliary writ in aid of its appellate jurisdiction on appeal, for the testimony to be transcribed at
28 government expense in a *in a* case already before the court and in its jurisdiction, for the exclusive use of the circuit court as an aid to determine whether or not "justice has been done" to a pauper defendant charged with a Capital Offense.

Your petitioner has learned that the writ of Scire Facias and Mandamus have been abolished, but the decisions prior to abolishing of these writs are still important. Mandamus, prohibition, and certiorari appear to have been the most important writs in this connection. The writ-issuing power of the Circuit Courts is not as restricted as the U. S. District Attorney seems to infer.

He states that there is no legal method by which the Court Reporter can be paid for furnishing this court a transcript of the

testimony in this case. Your petitioner verily believes that this court has the power in a case already in its jurisdiction and pending before it, to issue whatever writ or order that is necessary in aid of its appellate jurisdiction to see that justice is done even though it is an order for the costs of the transcript to be paid out of the funds of the government such as is paid to the Clerk of a District Court when that clerk prepares a transcript of a habeas corpus case which has been appealed to the Circuit Court in forma pauperis.

Your petitioner contends that Section 262 of the Judicial Code, 28 U. S. C. A., Sec. 377, gives this court power to proceed in the above-described way. The section reads as follows:

"The Supreme Court and the District Courts shall have power to issue writs of Scire Facias. The Supreme Court, the Circuit Courts of Appeal, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Your petitioner respectfully contends that the government paid the reporter John J. Williams who is also secretary to the Honorable Harry J. Lemley, U. S. District Court Judge, for his work to record in shorthand all of the evidence and proceedings in this case at trial, and as a result of the government paying John T. Williams for recording the trial, all the notes which are now available are the property of the United States District Court for the Western District of Arkansas, and by all interpretations of law should now be in the custody of the "Clerk of the Court" for the said district and available to that clerk to prepare and make certified copies of, on the order of any Circuit Court Judge or Justice of the Supreme Court. It seems off to your petitioner that a clerk of a District Court can be ordered to prepare certified copies of any and all records in his custody on any case and prepare them at government expense if so ordered; and
29 then to have a district attorney claim that there is no way to have a transcript of testimony in a criminal Capital case furnished to the Circuit Court of Appeals at government expense if the defendant happens to be a poor person.

Your petitioner respectfully submits that Section 262 of Title 28, U. S. C. A., Sect. 377, answers this claim of the U. S. District Attorney Clinton Barry. Answers it when it is called to the attention of the court that there is nothing in Section 832 of Title 28 U. S. C. A. that specifically or generally prohibits the transcript of testimony in a criminal capital case being furnished to a circuit court of appeals, at government expense for its use in determining whether or not a pauper defendant appellant has had justice rendered to him, on an affidavit in forma pauperis made by the defendant-appellant to the circuit court.

"Four"

Your petitioner again reiterates all the claims made in his petition for a rehearing and for a writ of certiorari, and swears that the testimony given at the trial and now available to be transcribed in the custody of the United States District Court for the Western District of Arkansas will verify every fact he has sworn to, will prove beyond a shadow of a doubt that no kidnapping ever occurred, will prove there was no intent, plan, thought, or scheme of committing a crime of kidnapping and will prove that your petitioner has been wrongfully convicted of a crime of kidnapping.

"Five"

With reference to that part of the government's response in which Assistant United States Attorney Thomas C. Pitts makes a sworn statement by affidavit that all the evidence and testimony was recorded in shorthand by Judge Lemley's secretary, John T. Williams, and at the conclusion of the trial was immediately available to the defendant (your petitioner), and is still available; your petitioner thinks this affidavit typifies the character and reveals the impudent attitude of the district attorneys handling of this case! What is the purpose of this affidavit? Manifestly it is to prove to this court that the District Attorney office is free from any censure, since the law has been observed to the letter. The testimony was available, and is still available to the defendant. Your petitioner prays that this court recall that no complaint on it has ever been raised on this point nor no complaint on it ever made by the petitioner.

The district attorn'y says in the response, in effect, "We do not deny the transcribed record will show that testimony which the petitioner swears will prove his innocence of the crime of kidnapping, but we will not allow that record to be opened to this court unless it is unlocked with a key which the petitioner does not have." The key is the price, the cost of the transcription of the testimony. Your petitioner being a poor person without any funds can only answer such an argument with a "prayer for justice," addressed to this Honorable Court.

"Six"

There are many statements in the government's response which are inconsistent with the facts of the case.

(A) The statement is made that Judge Lemley reduced the petitioner's sentence long after he had sentenced him, and reduced it on his own (Judge Lemley's) motion. The record shows

that your petitioner was sentenced on Feb. 6, 1941, to Seven Years, and on April 19, 1941, barely 72 days later, after your petitioner has written Judge Lemley a personal letter as a motion requesting him to set aside the sentence, the 7-year sentence was reduced to five years. Your petitioner is attaching a letter from his attorney (former) to this answer marked "Exhibit A," which will verify this statement.

(B) The statement is made that "Judge Lemley was of the opinion that the evidence testified to by Government witnesses, if true, justified Miller's conviction * * *." This cannot be said to be the truth for it can be disproven by Judge Lemley's comments at imposition of sentence. Judge Lemley spoke thusly:

"There is a doubt in my mind of you having any criminal intent (of kidnapping) at the time you went after the girl, however, you probably were guilty of abuse." And further, the Judge continued:

"Mr. John E. Harris, here, assistant United States Attorney wants you to have 9 years, so those children will be free of your jurisdiction, however, I am not going to give you that much time, for we do not have any record of you being cruel to your children, so I am not going to give you 9 years. Seven years is a long time, is a long, long time, and 5 years is too, but I understand Mr. Harris will not approve your application for a parole, however, you will have some good-conduct time coming to you for good behavior, and I am not going to attempt to take it away from you, so I will give you 7 years."

The above language of Judge Lemley's is almost verbatum to the best of your petitioner's recollection. It proves there was a doubt in the mind of the trial judge that your petitioner was guilty of the crime of kidnapping.

(C) The statement is made in the Response that:

"The defendant's counsel was of the opinion that substantial evidence of defendant's guilt had been heard by the jury, and that no good purpose could be served by attempting to
31 argue to the Circuit Court of Appeals that the court should believe Miller's practically unsupported statements as against the well-corroborated evidence of the government, consequently they decided not to attempt to secure a reversal on that ground."

Your petitioner's answer to this statement is that it is a very viscious misconstruction of the truth.

(1st) The point that the "evidence did not sustain the verdict," was first voiced by your petitioner's counsel as soon as the jury returned the verdict, and was believed by them so strongly

that they gave a newspaper reporter a long statement to that effect, and it was published in the "Texarkana Paper" the day after the jury returned the verdict. Your petitioner's trial lawyers told him that they were positive they could show the Circuit Court of Appeals that the "Evidence did not support the verdict," and secure his acquittal on that point alone if the petitioner could raise the money to have the testimony transcribed into a record on appeal. But if he could not raise the money for transacting the testimony then it would be impossible to bring that question up on appeal before the Circuit Court of Appeals.

(2nd) Naturally if the point that the "Evidence did not support the verdict" was brought before the Appellate Court without a complete transcript of the testimony then Miller's claim would be practically unsupported and without a chance of proof, but the district attorney's in their response attempt to have this Honorable Court believe, by sly innuendo, that your petitioner's trial attorney's would not attempt to raise this point because they thought there was no merit in it.

Your petitioner pleaded with his attorneys to raise the question before the Appellate Court that the "Evidence did not support the verdict" many times orally and by letter, but always received the same answer from them to wit: "It is impossible to raise this question without a transcript of the testimony to verify it, and since you cannot raise the money to pay for a transcript, we can not bring it to the attention of the Appellate Court." Your petitioner is attaching two letters from his attorney to this answer as Exhibits B and B-1, which will verify this statement.

"Seven"

In reference to the statement in the response (after a resume of the steps taken and made by the government employees, officials, and jurymen) that "The defendant by his unsupported statement seeks to overturn the whole sequence of events by which his conviction was secured."

32 Your petitioner's answer to this to again call this Honorable Court's attention to the fact that nowhere in the government's response is there a denial that the transcribed testimony will show every fact, that is set out in the petitioner's petition, to be positively true. That is the best answer; the district attorney knows that a copy of the transcribed testimony will prove to this court that your petitioner was wrongfully convicted of the crime of kidnapping, but he does not wish to have to admit to the embarassing fact that his office has had a hand in sending an absolutely innocent man to the penitentiary for a wholly non-committed crime.

Your petitioner contends that the district attorney seemingly is trying to convince this court that a "guilty verdict" returned by a jury is always to be taken then and there as positive proof of a defendant's guilt. The fallacy of such a conclusion is dispelled by the fact that there is a "Court of Appeals" over every district court in this land and your petitioner has been informed that during the year of 1941 there were over 3,000 cases appealed from the district courts to the Ten Circuit Courts of Appeal of the Nation.

"Nine"

Your petitioner wishes to inform this court that as soon as he received a copy of the "Order of this Court" of January 19, 1942, he wrote to all the witnesses who testified in his case in his trial whose addresses he could remember, and asked them to send affidavits to him as to what their testimony was so he could attach them as exhibits to this answer proving in a ex parte fashion all the allegations of his petition. Up to the date of the typing of this answer, he has received only one reply out of the six requests he made, and the petitioner is attaching this affidavit and true copies of it, of witness D. M. McClure.

"Ten"

Your petitioner humbly prays this Honorable Court will forthwith order the transcribed testimony be prepared at government expense, and in "question and answer form," verbatum just as it was given by the witnesses. Your petitioner believes testimony prepared in the "Narrative Form" may lose the original meaning put into the answers by the witnesses, and this Court would not get the true answers. Nearly all of the witnesses were poor, uneducated people and their language is not the language of lawyers and court employees such as a secretary to a Judge and language of a District Attorney.

33 "Eleven"

Your petitioner, thanking this Honorable Court for your bearing with him in this probably cumbersome answer to the government's response again swears he has never had any intent of, has never made any attempt to, and has never kidnapped anyone in his life, and that no crime of kidnapping at all has ever occurred in this case, and that the transcribed testimony will show this court that such is the truth, and that he has now been in prison nearly 13 months for the alleged commission of a crime that no person has committed at all.

Your petitioner respectfully request that this Honorable Court issue the necessary order or writ which will allow Justice to be done to him under the law, so he can be discharged from his wrongful imprisonment forthwith.

This answer is respectfully submitted by,

JESSIE W. MILLER,
Jessie William Miller,
Appellant-Petitioner.

34 In the United States Circuit Court of Appeals, 8th Circuit

[Title omitted.]

Jessie William Miller, before me this day, March 3rd, 1942, makes the necessary oath and deposes as follows:

He is familiar with the contents of this above answer and says every fact therein alleged is true to the best of his belief and knowledge; that he again states he is impoverished and has no property or money with which to pay costs, or employ an attorney and that he believes it necessary that he should have counsel in his pending case; therefore he prays the appointment of counsel by this Court to present his cause herein, if necessary. Also he believes his cause is meritorious and that he should be granted the relief which he seeks by his petition in this court. And for such petition, Jessie William Miller will ever pray.

JESSIE W. MILLER,
Petitioner.

STATE OF KANSAS,
County of Leavenworth, ss:

Sworn to and subscribed before me this 3rd day of March A. D. 1942.

GEORGE D. EBERSTEIN,
Notary Public.

My commission expires May 8, 1944.

35 *Exhibit A to answer*

(Under Heading No. 6)

Philip G. Alston

Attorney-at-law

TEXARKANA, ARKANSAS, *April 19, 1941.*

J. W. MILLER, PMB 58098,
Leavenworth, Kansas.

DEAR BILL: Your letter to Judge Lemley was received by him yesterday, and after some discussion of the matter between him,

myself, and the government attorney's, he decided that a term of seven years was a little bit too steep under the circumstances.

He entered an order, therefore, as of today reducing your sentence to a period of five years. This reduction, it seems to me, will serve as far as you are concerned the same purpose of an appeal of your case, as a matter of fact it probably will be better for you, and I suggest therefore that you allow me to dismiss the appeal.

As I told you before you left here, you have just got a term to serve, and the only question was whether or not it would be seven-year term or a five-year term. Speaking frankly, I don't think that even if you won your appeal, that you would ever be any better off than you are now, and you might possibly be worse off.

Please let me know at once whether or not you desire me to dismiss your appeal in accordance with the advise contained in this letter.

Very truly yours,

(s) PHIL G. ALSTON.

36 *Exhibits BE to answer*

Philip G. Alston
Attorney-at-Law

TEXARKANA, ARKANSAS, *September 29, 1951.*

JESSE WM. MILLER, PMB 58098,
Leavenworth, Kansas.

Re: J. W. Miller, Appellant v. U. S. No. 11958

DEAR BILL: Your case has been taken under advisement by the Circuit Court of Appeals, and I expect a decision within the next few days. I have very little hope, however, that your case will be reversed: Mr. Pitts, who argued the case for the government, told me a day or so ago that all the Court seemed to be interested in was whether or not you stood in loco parentis to Dorothy; that means whether or not she was actually a member of your family before the Texas trip; you know the answer to that question as well as I do.

As I have explained to you before, it was not possible to raise the question of sufficiency of the evidence upon which you were convicted; the only question raised was whether or not the jury should have been allowed to pass on the age of Dorothy.

You talk about taking this case to the Supreme Court of the United States; that is not as easy as it sounds, and I am not at all sure that the court would grant a writ of certiorari to review it. I will tell you now, however, that unless I am paid a sub-

stantial fee I would not be interested in carrying the case further. In the case of Gooch v. U. S. the Supreme Court indicated what it thought about the statutory exception as to parents, and I think you would be wasting time and money to even try to take the case there.

Sincerely yours,

(s) PHIL G. ALSTON.

37 [Copy]

Exhibit B–1 to answer

PhiliOp G. Alston
Attorney-at-law

TEXARKANA, ARKANSAS, *June 2, 1941.*

J. W. MILLER, PMB 58098,
Leavenworth, Kansas.

In Re: Jesse William Miller, Appt. vs. U. S.

DEAR BILL: Yours of May 28, received and contents noted. In regard to your appeal generally I may state that the brief is being prepared and will be filed within the time allowed by law.

And as has been explained to you before, it will be impossible for us to go into the merits of your case on the appeal. The only question which can be considered by the Circuit Court of Appeals is whether or not you are entitled to the benefit of the part of the statute excepting parents who kidnap their minor children. For this reason affidavits in regard to whether or not you kidnaped Dorothy would not even be read by the court, and sending such affidavits up there would probably hurt you a good deal, and would not help you at all.

The only thing for you to do is to wait and see what happens; it is possible that your case may be heard in September, but I do not know. I know it is hard for you to sit quietly during the pendency of proceedings which mean so much to you, but that is the only thing for you to do. I am doing everything possible for you, and all we can do is to hope and pray that the Circuit Court of Appeals will see the thing the way we do.

Very truly yours,

(s) PHIL G. ALSTON.

38 *Affidavit of D. M. McClure*

To whom it may concern:

I, D. M. McClure, Sherman, Texas (filling station and auto salvage as occupation).

Gives this as a true statement, to the best of my knowledge and ability of which I gave in the kidnaping Case at Texarkana, Ark., on or about February 10th A. D. 1941.

An quote:

"My business are locakated on highway #75 at the edge of Sherman, Tex., an wher' Jessie W. Miller an family lived for about four months in som' t'urist cabbins, an within 125 feet of my place. An wher' I seen them ever day, an talked to som' of the groop, an seen Dorothy Garner, likewise. Also seen her pas' my place goin' towarge town nombers of times, an seen her at home when the rest of the family wer' away, an at no time did I see or hear anything goin' 'rong an I seen an talked to Dorothy Garner just a fue minutes before she left. An at no time did she mention of bein' fooled or leared or kidnaped away from her home. An to my knowledge she had full discrission to do so."

(s) D. M. McClure.

Sworn and subscribed before me this 20th day of February 1942.

(s) Juniata Beach,

Notary Public for Grayson County.

My Commission expires June 1, 1943.

[File endorsement omitted.]

39. In United States Circuit Court of Appeals, Eighth Circuit

No. 11958—March Term, A. D. 1942

Jessie William Miller, appellant

vs.

United States of America, appellee

Appeal from the District Court of the United States for the Western District of Arkansas

Before Sanborn and Johnsen, Circuit Judges, and Nordbye, District Judge

Opinion

March 25, 1942

Per Curiam: This Court on November 25, 1941, affirmed the conviction of the appellant. 123 F. 2d 715. Thereafter the appellant, who is without funds and has entered upon the execution of his sentence, filed applications praying (1) for the appointment

of counsel to conduct further proceedings on his behalf, and (2) for an order directing that, at the Government's expense, a full and complete transcript of all of the testimony taken at the trial be sent to this Court to enable it to review and reconsider this case. The appellant had presented only one question for decision, and his record on appeal was insufficient to enable this Court to determine other questions if they had been presented.

40 Since in Holmes v. United States, — U. S. —, 62 S. Ct. 357, the Government had consented to the vacation of a judgment of affirmance entered by this Court (see 115 F. 2d 528) in a case where the record on appeal contained no bill of exceptions and was insufficient to enable this Court to determine the questions presented for decision, we considered it advisable, in the instant case, to ascertain whether the Government desired to consent that the case might be reopened to enable the appellant, Miller, to have a complete review. We therefore made an order requesting that the Government make response to the applications of the appellant, and affording the appellant an opportunity to reply to the response of the Government. (See 124 F. 2d 849.) The Government has made its response, in which it seeks to distinguish the situation in the Holmes case from the situation in this case, and states that it could not lawfully pay or be compelled to pay for a bill of exceptions in this case, and that the appellant had the opportunity to procure a complete record on appeal had he desired to do so. The Government indicates that it does not propose to consent to the vacation of the judgment of this Court or to a reopening of this case.

Whether there is a distinction between the Holmes case and the present case, we do not regard as important. What we were concerned about was whether the Government proposed to consent to a vacation of the judgment of this Court in this case and to a reconsideration and rehearing. This Court has decided the only question which was presented and which, upon the record, it had jurisdiction to decide, and we are convinced that it decided that question correctly. The only judgment which could have been entered was entered, and the case is ended so far as this Court is concerned. If further proceedings are to be con-

41 ducted by the appellant, they must necessarily be conducted in the Supreme Court of the United States. We are, therefore, of the opinion that the appellant, if he intends to proceed further, should apply to that Court for such relief and assistance as he may consider himself entitled to. He is granted leave to withdraw any of the original documents presented by him to this Court in connection with his applications for the appointment of counsel and for a complete transcript of the evidence.

If any further proceedings taken by the appellant in the Supreme Court result in any liability for Clerk's fees or costs in this Court, he, as a poor person, is relieved of the obligation to pay such fees or costs.

The applications of the appellant are denied.

128 Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

June 8, 1942

On consideration of the motion for leave to proceed further herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby granted.

129 Supreme Court of the United States

Order allowing certiorari

Filed June 8, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1942